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IN THE

Supreme Court of the United States

October Term, 1959

No. 822

IN THE MATTER OF THE APPLICATION OF

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, and JOHN J. CASSESE, on behalf of himself and others similarly situated,

Petitioners,

for an order, pursuant to Article 78 of the Civil Practice Act,

against

ROBERT F. WAGNER, individually and as Mayor of the City of New York, STEPHEN P. KENNEDY, individually and as Police Commissioner of the City of New York, and HAROLD A. FELIX, individually and as Commissioner of Labor of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Patrolmen's Benevolent Association of the City of New York, and John J. Cassese, on behalf of himself and others similarly situated, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of New York entered in the above-entitled proceeding on December 30, 1959.

Citations to Opinions Below.

The opinion of Justice Irving L. Levey (R. 113, 114) is reported in 17 Misc. 2d 42, 190 N. Y. S. 2d 102. The opinion of the Appellate Division (R. 121-127) is reported in 8 A. D. 2d 369, 187 N. Y. S. 2d 809. The judgment of the Court of Appeals, affirming the Appellate Division's order without opinion, printed in Appendix B hereto, *infra*, p. 31, is reported in 7 N. Y. 2d 813.

Jurisdiction

The judgment of the Court of Appeals of New York was entered on December 30, 1959 (Appendix B, *infra*, p. 31). By order of the Court of Appeals of New York entered February 25, 1960 the remittitur was amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellants contended that the exclusion of policemen from the grievance procedure provisions of Executive Order 49 violated the rights of appellants to the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that the exclusion of policemen from the grievance procedure provisions of Executive Order 49 did not violate those rights under the Fourteenth Amendment." (Appendix B, *infra*, p. 36).

The jurisdiction of this Court is invoked under 28 U. S. C., §1257(3) since the rights of the petitioners to the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States were drawn in question.

How Federal Question Is Presented

The federal question sought to be reviewed herein was raised in the petition to the Supreme Court of New York wherein petitioners alleged that respondents' failure and refusal to apply the grievance procedure provisions of Executive Order 49 to the uniformed police employees of the City of New York violated their rights under the Fourteenth Amendment of the Constitution of the United States, and sought an order directing the respondents to establish a departmental grievance procedure for the Police Department of the City of New York pursuant to and in accordance with the provisions of Executive Order 49 (R. 13, 14). Special Term found that the Mayor of the City of New York was considering the question of grievance procedure for the uniformed members of the Police Department and denied the petitioners' application without prejudice to a renewal either after a final expression from the city officials or after a reasonable period had elapsed without a decision having been made (R. 113, 114). The Appellate Division held that Executive Order 49 was not applicable to the uniformed police and modified the Special Term's final order by providing that the petition was dismissed on the merits, and affirmed the lower court's order as so modified (R. 119, 120). The Court of Appeals affirmed, without opinion, the order of the Appellate Division (Appendix B, *infra*, p. 31). Thereafter, upon petitioners' motion, the Court of Appeals by order dated February 26, 1960 amended the remittitur so as to recite the Constitutional question raised and determined therein, quoted *supra*, p. 2.

Constitutional Provision Involved

Amendment 14, Section 1, to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Question Presented

Whether the exclusion of the uniformed police employees of the City of New York from the grievance procedure of Executive Order 49 violated their rights to the equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States.

Statement

On January 21, 1959, petitioners applied to the Supreme Court of the State of New York for an order under article 78 of the Civil Practice Act (a) annulling a determination of respondent Commissioner of Labor of the City of New York to the effect that the grievance provisions of Executive Order 49, formulated by respondent Mayor, were not applicable to the Police Department; (b) directing the Commissioner of Labor to certify to the Mayor, pursuant

to the provisions of the Executive Order, that respondent Police Commissioner had wilfully failed to comply with the provisions thereof; and (c) directing respondents Mayor and Police Commissioner to establish a departmental grievance procedure for the Police Department of the City of New York (R. 9-14).

The petitioners are a patrolman employed in the New York City Police Department and the Patrolmen's Benevolent Association of the City of New York, a membership corporation representing almost all of the patrolmen in the Police Department (R. 9). The respondents are the Mayor, the Police Commissioner and the Commissioner of Labor of New York City (R. 9, 10).

Executive Order 49, issued by the Mayor on March 31, 1958 (R. 15-21; Appendix A, *infra*, p. 13), purported to establish an over-all labor relations policy and plan for the City of New York and its employees. It superseded and broadened an Interim Order concerned with the same subject matter which was issued by the Mayor on July 21, 1954 (R. 55-64; Appendix A, *infra*, p. 21). Section 3 of the Interim Order granted to municipal employees "the right to self-organization" and specifically provided that the policy therein declared should not be deemed to affect the existing practice in the Police Department pending further study and report on their organizational rights (R. 56; Appendix A, *infra*, p. 22). Section 5 of the Interim Order, entitled "Departmental Grievance Procedures," directed heads of the departments and agencies covered thereby to establish grievance procedures (R. 58-62; Appendix A, *infra*, p. 24). Section 7 of Executive Order 49 incorporated section 5 of the Interim Order by reference (R. 20; Appendix A, *infra*, p. 18), and thus provides for

the establishment of a specific kind of grievance procedure in each city department and agency, with a last-step appeal to the Commissioner of Labor.

Neither section 5 nor any other part of the Interim Order except section 3 mentioned the police or the Police Department. The exclusion of police in the Interim Order was thus expressly limited to the self-organization provision set forth in section 3 thereof (R. 83). Executive Order 49 is in its terms directed to the "Heads of All City Departments and Agencies," without exception (R. 15; Appendix A, *infra*, p. 13). It refers generally to employees of the City of New York, without limitation (R. 15-18, 20, 21: Appendix A, *infra*, pp. 13-17, 19).

Nevertheless, the Police Commissioner failed to take any measures whatever to implement the grievance procedure provisions of Executive Order 49 in the Police Department. Petitioners made a demand in December 1958 upon the Mayor and the Police Commissioner to establish the type of grievance procedure called for by the Order, but this demand was not granted (R. 11, 12). In January 1959 the petitioner, Patrolmen's Benevolent Association of the City of New York, petitioned the Commissioner of Labor to advise the Mayor, pursuant to section 11 of Executive Order 49, that the Police Commissioner was wilfully failing and refusing to comply with the grievance procedure provisions (R. 12), but this relief was also denied on the ground that Executive Order 49 was not applicable to the police (R. 13, 36, 37).

Thereafter, petitioners began this proceeding to require defendants to effectuate and implement Executive Order 49 by establishing a grievance procedure in the Police Department (R. 9-14). The respondents opposed the relief sought

basically on the ground that Executive Order 49 was not applicable to the Police Department and, in addition, set forth certain affirmative defenses and legal objections (R. 38-45). Petitioners filed a reply denying the affirmative allegations of the answer (R. 70-72), and both sides filed affidavits in support of their pleadings (R. 46-54, 73-112).

The Supreme Court at Special Term dismissed the petition without prejudice to enable the Mayor to complete his alleged study of the problem (R. 113, 114). The lower court made no finding as to the scope of Executive Order 49, nor did it purport to deny relief because of any equitable considerations.

On appeal, the Appellate Division dismissed the petition on the merits (R. 119, 120). In its opinion, the Appellate Division held that the Executive Order excluded from its scope the uniformed members of the Police Department (R. 126). The Appellate Division found that the "pattern of procedural steps in regard to grievances set forth in the Interim Order is inextricably tied in with the right of representation, which is basic to the concept of the right of organization not extended to the uniformed members of the Police Department by the Interim Order" (R. 126). The Appellate Division therefore ruled that the grievance procedure provisions of Executive Order 49 were not available to policemen (R. 125, 126).

On appeal to the Court of Appeals petitioners argued that it would be unconstitutional to treat policemen differently from all other municipal employees (such as firemen) with respect to grievance procedure.

The Court of Appeals affirmed the Appellate Division's order, without opinion (Appendix B, *infra*, p. 31). Upon petitioners' motion, the Court ordered that the remittitur be amended by adding the following:

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellants contended that the exclusion of policemen from the grievance procedure provisions of Executive Order 49 violated the rights of appellants to the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that the exclusion of policemen from the grievance procedure provisions of Executive Order 49 did not violate those rights under the Fourteenth Amendment." (Appendix B, *infra*, p. 36).

Reasons for Granting this Writ

1. Executive Order 49 provided for the establishment of departmental grievance procedures in all departments and agencies of the City of New York but has been held by the New York Courts to exclude New York City's 20,000 patrolmen from its benefits. It is submitted that this unconstitutionally discriminates between patrolmen and all other employees of the City of New York such as firemen. This discrimination not only affects the morale and efficiency of the 20,000 policemen of the City of New York by denying them the equal protection of the laws but also involves the rights of thousands of policemen in all municipalities of the United States. As the largest city in the United States and presumably one of the country's most progressive cities, New York is the cynosure of all eyes and its treatment of municipal employees serves as a guide throughout the country. If its police employees are denied the equal opportunity and right to have their grievances considered in a manner which will insure them an impartial

disposition, a precedent will be set for denying policemen in all municipalities the benefit of the grievance machinery which is commonly granted to all other municipal employees, including firemen.

The question of the availability of grievance procedures to patrolmen is of the utmost importance in municipal administration. Settlement of the question by this Court is plainly in the public interest because it involves not only the fundamental rights to fair treatment of the 20,000 policemen in the City of New York but also the rights of thousands of policemen in hundreds of cities all over the United States.

2. The decision of the court below is at variance with established principles of law applied in the pertinent decisions of this Court.

The constitutional guarantee of equal protection requires similar treatment for all persons similarly situated. *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (1928); *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6*, 256 U. S. 658 (1921); *Southern Ry. Co.* v. *Greene*, 216 U. S. 400 (1910); and *Truax* v. *Corrigan*, 257 U. S. 312 (1921).

While proper classification does not violate the constitutional guarantee, the classification must be based on significant differences which are pertinent to the subject with respect to which the classification is made and must bear some relationship to the objective sought by the legislation. If either element is absent, the classification is arbitrary and discriminatory and violates the equal protection clause of the Fourteenth Amendment to the Constitution. *Asbury Hospital* v. *Cass County*, 326 U. S. 207 (1945); *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552

(1947); *Morey* v. *Doud*, 354 U. S. 457 (1957); and *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580 (1935).

There is no significant difference between policemen and other employees of the City of New York with respect to their need for, and the desirability and appropriateness of, departmental grievance procedures. There is no mention of any differentiating element setting the police apart from other municipal employees, insofar as grievance procedure is concerned, in the record or in any of the many reports and monographs prepared by the Department of Labor which were relied upon in formulating the New York City labor relations program for municipal employees as set forth in Executive Order 49 (R. 85-90). Since there is a complete absence of any factor which would differentiate the police from other city employees with respect to the appropriateness and desirability of a grievance procedure, there is no valid basis for discriminating against the police by denying them the grievance procedure granted all other municipal employees.

The grievance procedure provisions of Executive Order 49 are available to New York City firemen. Traditionally, policemen and firemen have been considered to be in a single class in so far as their disciplinary problems are concerned. Note, *Union Activity in Public Employment*, 55 Col. L. Rev. 343, 346 (1946) and Annotation, 31 A. L. R. 2d 1142, 1149 (1953). Furthermore, at least two courts have held that policemen and firemen are in a single class. *Hutchinson* v. *Magee*, 278 Pa. 119, 122 Atl. 234 (1923) and *Carter* v. *Thompson*, 164 Va. 312, 180 S. E. 410 (1935).

It is a cardinal axiom of the equal protection clause that persons similarly circumstanced must be similarly treated. If no significant differences exist between purported classes

with respect to the subject matter, they are, from the point of view of the equal protection clause, within the same class and must be treated alike. With respect to the need for, and appropriateness of, grievance procedures, there is no legally operative distinction between policemen and firemen. Since firemen are included within the grievance procedure provisions of Executive Order 49, there cannot be any reasonable ground for excluding the police, and if the police are excluded, it would be an unconstitutional discrimination.

Because there was no suggestion anywhere in the record of any difference between the police and other municipal employees with respect to grievance procedures, the Appellate Division sought to justify the discrimination on the ground that there are differences between the police and other municipal employees with respect to the desirability of their unionization. Thus, the Court had to find a reasonable connection between the objective of preventing unionization (and preserving discipline in the police department) and excluding the police from the generally available grievance procedures established in Executive Order 49. But the Court failed to point out any rational reason for believing that the exclusion of police from the grievance procedure provisions would further the objective of preventing their unionization. If anything, the stifling of any and all means of presenting complaints and righting wrongs would be conducive to *promoting* unionization rather than *avoiding* it.

'If there is no valid relationship between the exclusionary classification and the stated objective with respect to grievance procedures, the fact that the classification may be valid as to the self-organization provisions of Executive

Order 49 does not help the respondents. Classification which is reasonable and valid for one purpose may be wholly unreasonable and invalid for another. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (1928).

The establishment of a systematic and orderly procedure for the redress of grievances as set forth in Executive Order 49 is not inextricably connected with the right of self-organization. The stated objective of preserving discipline and preventing unionization in the Police Department can be achieved without in any way affecting the right of patrolmen to be heard on their employment grievances. Therefore, if the policemen are excluded from the grievance procedure provisions of the Executive Order, there is an arbitrary and discriminating classification with the result that their right to the equal protection of laws is violated.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 25, 1960

APPENDIX A

Executive Order 49

CITY OF NEW YORK
OFFICE OF THE MAYOR
New York 7, N. Y.

March 31, 1958.

EXECUTIVE ORDER No. 49

To: Heads of all City Departments and Agencies

From: Hon. Robert F. Wagner, Mayor of the City of New York

Subject: Executive Order on the Conduct of Labor Relations Between the City of New York and Its Employees.

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1. INTRODUCTION

Inquiry into the mutual needs of the City and its employees and experience developed in the establishment and maintenance of labor relations in the municipal service since issuance on July 21, 1954, of the Interim Order on the Conduct of Relations Between the City of New York and Its Employees, and of the amendment thereto of March 14, 1955, have indicated the necessity for devising a new program of collective dealing between the City and its employees. Accordingly, this order is hereby issued. It shall, in place and in stead of said Interim Order, constitute

the present labor-relations policy and plan for the City of New York and its employees. Said Interim Order, to the extent not incorporated in this order, is hereby revoked and superseded. This order shall be referred to as the "Executive Order on City Employee Relations".

2. Declaration of Policy

Experience has indicated that labor disputes between the City and its employees will be minimized, and that effective operation of the City's affairs in the public interest will be safeguarded, by permitting employees to participate, to the extent allowed by law, through their freely chosen representatives in the determination of the terms and conditions of their employment.

Experience has further indicated that such joint participation can most effectively be achieved by negotiating and bargaining with the representatives shown to be the free choice of a majority of the employees and that such free choice can best be assured through the utilization of orderly and peaceful procedures designed to ascertain the wishes of the employees.

Accordingly, it is hereby declared, subject to the limitations of the Constitution and the Laws of the State of New York and of the charter and applicable laws of the City of New York, to be the policy of the City of New York to promote the practice and procedures of collective bargaining for the City of New York and the duly chosen majority representatives of its employees. Within the limitations imposed by law upon the authority of city officials to rep-

resent and act for the City, and upon the nature of the subjects open to collective bargaining, the objective shall be to further and promote in so far as possible the practice and procedures of collective bargaining prevailing in private labor relations.

3. Rights of Employees

Employees of the City of New York shall have the right to self-organization, to form, join or assist labor organizations for their mutual aid or protection, and to bargain collectively through representatives of their own choosing concerning the terms and conditions of their employment. They shall have the right also to refrain from any or all of such activities.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a grouping or unit appropriate for such purposes shall be the exclusive representatives for collective bargaining concerning the terms and conditions of employment of the employees in such grouping or unit: Provided, That nothing herein shall be construed to prevent any city official from meeting with any labor organization for the purpose of hearing the views and requests of its members in such grouping or unit so long as (a) the majority representative is informed of the meeting; (b) deliberations on such views are had solely with the majority representative; (c) any changes or modifications in terms and conditions are made only through negotiation with the majority representative; and (d) the minority representative is not permitted to present or process grievances.

Employees shall have the right at appropriate times to have the question of the representative status of any labor organization resolved by appropriate and suitable methods, including a secret-ballot election.

Nothing herein shall be construed to deny to any individual employee his rights under Section 15 of the New York Civil Rights Law or under applicable civil service laws or regulations.

4. Representation Procedures

In order to insure the full exercise of the rights granted to the employees of the City of New York in this order, the Department of Labor shall have the authority to resolve questions concerning representation by conducting a secret-ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees.

The Commissioner of Labor shall decide in each instance which employee grouping or unit, i.e., one or more departments, or any subdivisions or classifications thereof, will assure to employees the fullest freedom in exercising the rights herein granted consistent with the efficient operation of the public service and to designate such grouping or unit as appropriate for the purposes of collective bargaining.

The Commissioner of Labor, with the approval of the Mayor, shall prescribe such rules and regulations as he deems necessary and administratively feasible to carry

out and promote the basic policy herein declared and to achieve effective and stable relations between the City of New York and its employees. Such rules shall empower the Commissioner of Labor, among other things: (a) to render an official report of the results of the election or other method utilized and to certify the exclusive bargaining representative for an appropriate grouping or unit, such certificate normally to remain in effect for a period of one year from its date, and thereafter until such time as it shall be made to appear that the certified representative does not represent a majority of the employees in the appropriate unit; (b) to determine, in the interest of effectuating the policies herein declared, when special circumstances require that a particular certification shall remain free from challenge or attack for a period of either longer or shorter than one year.

5. Intervention to Resolve Disputes

In the event that the parties are unable to reach agreement as to substantive terms and conditions of employment after sincere and exhaustive bargaining, they may seek the intervention of the Commissioner of Labor or, if the public interest so requires, the Commissioner of Labor may proffer his services upon his own motion. It shall thereupon be the duty of the Commissioner of Labor to take such steps as he may deem expedient to effect an expeditious adjustment and settlement of the differences between the parties.

6. JOINT LABOR RELATIONS COMMITTEES

Until a majority representative has been selected for the purposes of bargaining collectively for a particular employee grouping or unit, any labor organization having members among the employees in such grouping or unit may represent such members for the purposes and in the manner and under the conditions set forth in section 6 of the Interim Order of July 21, 1954, as amended on March 14, 1955, dealing with the establishment of and participation in joint labor relations committees. The provisions of section 6 of the Interim Order, as amended, are hereby incorporated in and made a part of this order to the extent herein indicated.

The Department of Labor shall have the authority to determine questions of representation in connection with the establishment of joint labor relations committees or participation in such committees. The Commissioner of Labor, with the approval of the Mayor, shall prescribe such rules and regulations as may be necessary and practicable for the resolution of such questions.

7. PRESENTATION AND ADJUSTMENT OF GRIEVANCES

The provisions of section 5 of the Interim Order, relating to the institution and observance of grievance procedures, are hereby incorporated in and made a part of this order, with the following changes and additions: Any individual employee may present his own grievance either personally or through an appropriate representative or an

organization of which he is a member and have such grievance adjusted: Provided, however, that where a majority representative has been selected as the bargaining agent for the unit of which the employee is a part, the grievance may be presented and processed either by such bargaining agent or by the employee as an individual, but not through any minority organization.

8. Protection of Employees in the Exercise of Their Rights

There shall be no discrimination against any employee because he has exercised the rights of self-organization and collective activity granted by this order or because he has presented a grievance under this order. Nor shall there be any discrimination against any employee because he has given testimony or information in any hearing or conference relating to any matter presented or arising under this order.

Charges of a violation of this section shall be referred to or filed directly with the Department of Labor, which shall make appropriate determination after proper hearing and notice.

9. Non-Qualified Organizations

The provisions of section 4 of the Interim Order, relating to the disqualification of organizations seeking or claiming to represent employees of the City, are hereby incorporated in and made a part of this order.

Appendix A

10. Interpretation and Construction

Whenever necessary, the Commissioner of Labor may issue an opinion interpreting or construing the provisions of this order.

11. Compliance

The Commissioner of Labor shall submit periodic reports to the Mayor on the progress of labor relations under this order.

Whenever the Commissioner of Labor has reason to believe that there has been a willful failure on the part of any department or agency head to comply with the policy and provisions of this order, he shall so advise the Mayor in writing, together with a statement of the basis for such belief.

/s/ Robert F. Wagner
Mayor.

Appendix A

Interim Order

For Release
Wednesday, July 21, 1954
Afternoon Papers

City of New York
Office of the Mayor

INTERIM ORDER ON THE CONDUCT OF RELATIONS
BETWEEN
THE CITY OF NEW YORK -and- ITS EMPLOYEES

1. INTRODUCTION

Pending completion of the study of labor relations in the public service by the Department of Labor of the City and the formulation of a more comprehensive program for the conduct of relations between the City of New York and its employees, the following executive order has been promulgated as the interim labor relations policy and plan to be put into effect as hereinafter provided by each of the municipal departments and agencies of the City of New York to which this Order is directed until further official notice and in place and stead of any prior order from the Office of the Mayor on this subject.

2. DECLARATION OF POLICY

It has been generally demonstrated that when employees through their chosen representatives are accorded a reasonable and orderly opportunity to present their

proposals to their employers regarding the terms and conditions of their employment and are assured adequate machinery for the redress of their grievances, it can result in a better and more efficient functional operation and entity.

Accordingly, it is hereby declared, subject to the limitations of the Constitution and the laws of the State of New York, to be the basic policy of the City of New York, to assure to its employees full freedom of association and designation of bona fide and responsible representatives of their own choosing, for the purpose of the orderly presentation and adjustment of their grievances and, at appropriate times, their proposals concerning the terms and conditions of their employment and for their fair and timely disposition.

3. Rights of Employees

Employees of the City of New York shall have the right to self-organization, to form, join or assist bona fide organization of their own choosing concerned with the protection of their interests as employees of the City and shall have the right also to refrain from any or all of such activities. Pending further study and report on the organizational rights of the uniformed members of the Police Department, the policy herein declared shall not be deemed to affect the existing practice in the Police Department in this regard.

Appendix A

4. Non-Qualified Organizations

No organization seeking or claiming to representing employees of the City shall be recognized for any of the purposes of this Interim Order if it is motivated, controlled or dominated by fascist, communist or other organizations or groups which advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or advocates, advises, teaches or embraces the duty, necessity or propriety of adopting such doctrine, or if such employee organization allows in office or permits to represent it any person who is a member of or supports any organization that advocates, advises, teaches or embraces the doctrine that the government of the United States, or of any state, or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or advocates, advises, teaches or embraces the duty or propriety of adopting any such doctrine.

If any Head of any Department or Agency covered by this Interim Order has reason or cause to believe that any organization seeking to invoke the privileges of this Order, violates or offends the provisions herein set forth, such official may call upon the organization to furnish satisfactory and sufficient proof attesting and establishing that the qualifications herein contained have been fulfilled. Copies of the material so furnished shall be transmitted by the Department or Agency to the Department of In-

vestigation of the City of New York for inquiry and investigation. If the investigation and inquiry of the Department of Investigation indicates, in the judgment of the Commissioner of the Department of Investigation, that there is prima facie basis for the charges he may recommend a suspension of recognition of such organization for the purposes of this order by all departments and agencies covered hereby, pending a prompt hearing and report on the matter by an impartial panel to be selected by the Mayor.

No public statement by any City official concerning any matter involving alleged violations of the conditions herein contained before an impartial hearing and determination of the same is made shall be issued without assuring all possible safeguards to the organization and the persons involved to avoid any premature implications or inferences that the violations alleged have been proved or established.

5. Departmental Grievance Procedures

Each Head of Department or Agency covered hereby shall establish within fifteen (15) days of the receipt of this Interim Order, rules of procedure for the orderly presentation and timely consideration and adjustment of complaints and grievances by and on behalf of employees of the Department or Agency arising out of claimed violation, misinterpretation or inequitable application of the existing policy rules and regulations applicable to the Department or Agency. Such rules for the processing of grievances shall not supersede or replace Departmental or

Appendix A

Agency procedures now provided in disciplinary matters arising under the Civil Service Law. Copies of the grievance rules promulgated hereunder shall be filed with the City Department of Labor when formulated.

In the interest of attaining a measure of uniformity in the grievance procedures for all departments and agencies covered herein, the grievance rules should provide for definite and, under ordinary circumstances, mandatory steps in processing the grievance through the channels of departmental supervision before it reaches the Head of the Department or Agency. The general pattern of grievance procedural steps should be substantially as follows:

Step 1. The complaint or grievance shall be presented verbally or in writing, by the aggrieved employee or his representative to the supervisor in the division or branch of the Department where the grievance is claimed to have occurred, but not necessarily to the immediate supervisor of the employee or employees allegedly aggrieved. Discussion and consideration of the complaint or grievance may be assisted by higher level supervisors who may be called in for this purpose. If the complaint or grievance is not resolved within two (2) working days of its presentation, the complainant either individually or by his representative has the right to proceed to the next step in the grievance procedure:

Step 2. The complaint or grievance must be reduced to writing and filed, within five (5) working days of the completion of Step 1, with the official of the

Department or Agency in charge of personnel or with the person designated by the Commissioner or Head of the Department or Agency to represent him in the adjustment of grievances. A copy of the complaint and grievance must be sent to the employee's supervisor who initially passed upon the grievance.

The grievance shall be considered and passed upon within three (3) working days after receipt of the appeal from Step 1. The aggrieved and his representative and the Department or Agency representative shall work for a satisfactory adjustment of the grievance through conference, negotiation and agreement. The determination and comments of the Department or Agency representative passing upon the grievance shall be in writing, copies of which shall be transmitted to the aggrieved or his representative upon issuance. The aggrieved has the right to appeal the determination as provided in the next step of the grievance procedure:

Step 3. Within five (5) working days after the decision in Step 2 shall have been issued, the aggrieved shall have the right to appeal the determination to the Commissioner or the Head of the Department or Agency concerned. The Commissioner or Head of Department, the Departmental designee, the aggrieved and his representative shall work for a satisfactory solution of the grievance or complaint through conference, negotiation and agreement. Such conference shall be held at an appropriate time consistent with

the requirements of the Department or Agency. The determination of the Commissioner or Head of Department shall be issued within five (5) working days after receipt of the appeal;

Step 4. If, only after completion of all the grievance steps provided at the departmental or agency level, the grievance or complaint has not been resolved within the affected Department or Agency, the aggrieved or his representative may file a request, in writing, to the City Department of Labor, for review of the complaint or grievance and the determination thereon. Such request must be filed within five (5) days of the receipt of the determination in Step 3 and must be accompanied by the written record of the previous appeals and the written decisions and comments issued by the previous appeals officers. A copy of such request must be filed simultaneously with the affected Department or Agency.

Within five (5) working days of the receipt of said request the Commissioner of the Department of Labor or his designee shall determine whether the request for review shall be granted and, if so, how and when the appeal shall be heard. On the hearing or conference and in such an appeal the Commissioner of the Department of Labor may require the presence, in addition to representatives of the affected Department or Agency, of representatives of the Bureau of the Budget and the Department of Personnel if deemed necessary to the proper disposition of the issue. If the grievance or complaint is within the legal power

of the Commissioner of the Department of Labor to determine it shall be promptly decided by him or his designated Deputy Commissioner, or, if beyond the power or province of the Department of Labor to decide, such other recommendation shall be made to the Mayor by the Commissioner of the Department of Labor for the appropriate consideration and disposition of the grievance or complaint.

6. JOINT LABOR RELATIONS COMMITTEES

While the rights of qualified labor organizations separately to present demands and confer with the head of any Department or Agency hereunder on matters concerning the wages, hours and working conditions of the employees represented by them shall in no way be altered or impaired, for the purpose of gaining and appraising experience in collective dealings in the city service there shall be established on or before October 1, 1954 in each Department or Agency hereunder a joint labor relations committee, on the order of a labor-management committee, to consist of representatives of the employees in the Department or Agency and representatives of the Commissioner or Head of the Department or Agency.

The joint labor relations committee shall assist, through regular and periodical conferences and consultations, in formulating policies and suggesting changes which may be necessary in existing policies, concerning the wages, hours and working conditions in the Department or Agency, as well as in measures to improve the efficiency of the operations of the Department or Agency.

Appendix A

The employee delegates on the joint labor relations committee shall be designated only by the employees or by any qualified organization which exists and is constituted for the purpose of dealing with employers concerning labor relations matters and which has been selected by and represents a substantial group of the employees in the Department or Agency. The designees of such an organization to the joint committee may be officers or agents thereof. The number of such delegates on the joint committee allotted to such an organization in representing a substantial group of employees in the Department or Agency may be in such proportion to the whole number of employees in the Department or Agency as shall be arranged between the Head of the Department and the affected employees.

In the event of a challenge or question by the Department or Agency as to the representative status of an organization seeking representation on such joint labor relations committee, the facts of eligibility may be determined in an impartial manner mutually agreeable to the applicant organization and the Head of the Department or Agency. Pending the determination of eligibility, the organization so challenged shall not be permitted to have recognized delegates to serve on such joint labor relations committee, although with the consent and approval of the members of the committee it may be permitted to have observers present at committee sessions.

7. No Discrimination Against Employee for Joining Employee Organization or Invoking Grievance Procedure

There shall be no discrimination against any employee because such employee has formed, joined or chosen to be

represented by any employee organization for the purposes of this Order, nor shall there be any discrimination against any employees because of any grievance brought under the provisions of this Interim Order, or for any testimony or evidence presented by any employee in any grievance hearing or conference relative thereto. Any charges of a violation of this provision shall be referred directly to the City Department of Labor for appropriate determination after proper hearing and notice to all interested persons and the Department or Agency involved.

8. Interpretation and Construction of Interim Order

Any requests for interpretation or construction of the terms and provisions of this Order shall be made in writing by the Commissioner or Head of Department or Agency or by any qualified employee organization and filed with the City Department of Labor for appropriate disposition.

9. Adherence to Interim Order

The provisions of the above Interim Order shall constitute the procedure for the resolution of employee relations problems and until amended or superseded by subsequent order, the Commissioner or Head of each such Department or Agency shall adhere strictly to its provisions.

Robert F. Wagner.
Mayor

APPENDIX B

Judgment of Court of Appeals of New York

[County Clerk's certificate attached.]

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of December in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur December 30, 1959.

Appendix B

No. 275.

In the Matter of the

Application of Patrolmen's Benevolent Association of the City of New York, and John J. Cassese, on behalf of himself and others similarly situated,

Appellants,

for an Order, &c.

vs.

Robert F. Wagner, individually and as Mayor of the City of New York, & ors., &c.,

Respondents.

Be it Remembered, That on the 8th day of September, in the year of our Lord one thousand nine hundred and fifty-nine, Patrolmen's Benevolent Association of the City of New York, and John J. Cassese, on behalf of himself and others similarly situated, the appellants in this cause, came here unto the Court of Appeals, by Phillips, Nizer, Benjamin, Krim & Ballon, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Robert

Appendix B

F. Wagner, individually and as Mayor of the City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Charles H. Tenney, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Mortimer B. Wolf, of counsel for the appellants, and by Mr. Edward A. Doberman, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 30, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON
Clerk

Appendix B

Order of Court of Appeals of New York Dated February 25, 1960

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of February A. D. 1960.

Present, Hon. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 118

In the Matter of

the Application of Patrolmen's Benevolent Association of the City of New York, and John J. Cassese, on behalf of himself and others similarly situated,

Appellants,

for an Order &c.

vs.

Robert F. Wagner, individually and as Mayor of the City of New York, & ors., &c.,

Respondents.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appel-

lants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellants contended that the exclusion of policemen from the grievance procedure provisions of Executive Order 49 violated the rights of appellants to the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that the exclusion of policemen from the grievance procedure provisions of Executive Order 49 did not violate those rights under the Fourteenth Amendment."

AND the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 20 1960
JAMES R. BROWNING, Clerk

[36122]

IN THE

Supreme Court of the United States

October Term, 1959

No. 822

In the Matter of the Application of

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, and JOHN J. CASSESE, on behalf of himself and others similarly situated,

Petitioners,

for an order, pursuant to Article 78 of the Civil Practice Act,

against

ROBERT F. WAGNER, individually and as Mayor of the City of New York, STEPHEN P. KENNEDY, individually and as Police Commissioner of the City of New York, and HAROLD A. FELIX, individually and as Commissioner of Labor of the City of New York,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SEYMOUR B. QUEL,
EDWARD A. DOBERMAN,
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32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

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IN THE

Supreme Court of the United States

October Term, 1959

No. 822

In the Matter of the Application of

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, and JOHN J. CASSESE, on behalf of himself and others similarly situated,

Petitioners,

for an order, pursuant to Article 78 of the Civil Practice Act,

against

ROBERT F. WAGNER, individually and as Mayor of the City of New York, STEPHEN P. KENNEDY, individually and as Police Commissioner of the City of New York, and HAROLD A. FELIX, individually and as Commissioner of Labor of the City of New York,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents for their statement in opposition to petitioners' application for a writ of certiorari respectfully show the following:

Question Presented

In a writing termed an executive order, the Mayor of the City of New York modified an existing program for the conduct of labor relations between the City and its employees. Simultaneously he stated that the order would not be made applicable to the uniformed police pending further study (R. 67). The question here is whether, despite the Mayor's expressed intent, the petitioners, who are a policeman and a police organization, may validly insist that the application of those provisions of the executive order relating to machinery for the presentation of grievances must be extended to include the uniformed police of New York City on the ground that failure to include them would violate their rights to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Statement

On March 31, 1958, the Mayor of New York City issued an "Executive Order on the Conduct of Labor Relations Between the City of New York and Its Employees", also described as Executive Order No. 49 (R. 15-21). There had been an Interim Order upon the same subject which was issued on July 21, 1954 (R. 55-64). Section 7 of the Executive Order (R. 20) incorporated by reference Section 5 of the Interim Order, dealing with the establishment of procedures for the consideration of grievances of City employees (R. 58-62).

The petitioners instituted this proceeding in the Supreme Court of the State of New York to compel the establishment of grievance procedures applicable to the Police

Department of New York City and for related relief (petition, R. 9-14; reply, 70-72; affidavits, 73-112). The respondents contended in substance that the Executive Order was not applicable to the uniformed police (answer, R. 38-45; affidavits, 46-54, 105-6).

In spite of the incidental reiteration in petitioners' Statement of some of the contentions previously made by them concerning the construction of the Executive Order which they advocated, they concede that Executive Order No. 49 has been held by the New York courts not to apply to the uniformed policemen of New York City (Pet. Brief, p. 8). Accordingly, there is no reason for detailed examination here of the bases for that conclusion, which, in substance, was drawn from the language of the order and other internal evidence of intent [*e.g.*, R. 58 (fol. 173), 124 (fol. 370), 126 (fol. 377); 56 (fols. 167-8), 125-6 (fols. 375-6)], and from a consistent pattern of prior and contemporaneous administrative construction (*e.g.*, R. 47-54, 88, 105-6), including the Mayor's press release issued together with the Executive Order, which stated that for the time being the latter would not be made applicable to the uniformed police (R. 67, 124).

A Justice of the Supreme Court of the State of New York dismissed the petition without prejudice (R. 5-6). His opinion (R. 113-4) is reported in 17 Misc 2d 42. The Appellate Division modified by dismissing the petition on the merits and otherwise affirmed the order appealed from (R. 119-120). Its opinion (R. 121-7) is reported in 8 A D 2d 369. The Court of Appeals affirmed the Appellate Division's order without opinion (Pet. Appendix B, pp. 31-34). Its judgment is reported in 7 N Y 2d 813, remittitur amended 7 N Y 2d 967 (*ibid.*, pp. 35-36).

ARGUMENT

No substantial question is presented for review regarding the alleged denial of equal protection of the laws.

(1)

In urging that certiorari be granted, the petitioners state that the decision herein may set a precedent for denial of grievance machinery to policemen in all municipalities. However, a review of applicable decisions in other jurisdictions makes it clear that the instant case is not one of first impression.

In *King* v. *Priest*, 357 Mo. 68, 206 S. W. 2d 547 (1947), appeal dismissed 333 U. S. 852 (1948), it was claimed that a rule of the St. Louis police department forbidding union membership was unreasonable. Conceding that the right to bargain collectively was non-existent for public employees, it was urged (206 S. W. 2d, at p. 553), among other things, that at least the presentation of grievances by a union on behalf of policemen could not be injurious to good order and discipline, or detrimental to efficiency. The department's rule was nevertheless sustained by the State court. An appeal to this Court was dismissed for want of a substantial federal question.

Massachusetts, while allowing union membership to public employees and the presentatio by them of proposals relating to salaries or other "conditions of employment", expressly excepts police officers (but not firemen) from all such privileges. Mass. General Laws (Ter. Ed.), C. 149, § 178D. North Carolina makes it a misdemeanor for a public employee to be a member of any union which has among its purposes collective bargaining with respect to "griev-

ances", labor disputes, etc. G. S. §§ 95-97 *et seq.* (N. C. Sess. Laws, 1959, c. 742). We have made no effort to review exhaustively the decisions or statutes of other states bearing upon the present discussion, but it is apparent that the case at bar does not have the nation-wide importance which the petitioners claim for it.

(2)

The privileges open to New York City employees under the Executive Order are extended as a matter of grace or favor, not as a matter of right.

A showing that another has been fortunate enough to be recipient of a *favor* at the hands of municipal officials or under a local ordinance, which the complaining party has been denied, does not establish a denial of equal protection. *McCoy* v. *Providence Journal Co.*, 190 F. 2d 760 (1st Cir., 1951), cert. den. 342 U. S. 894 (1951).

(3)

Ordinances or rules and regulations excluding the police from union membership, with its usual concomitants of collective bargaining and the like, have been sustained by the courts against constitutional attack based on denial of equal protection, and other constitutional grounds. See, *e.g.*, *King* v. *Priest*, 357 Mo. 68, 206 S. W. 2d 547 (1947), app. dism. 333 U. S. 852 (1948); *Jackson* v. *McLeod*, 199 Miss. 676, 24 So. 2d 319 (1946), cert. den. 328 U. S. 863 (1946); *C. I. O.* v. *Dallas*, 198 S. W. 2d 143 (1946); *Perez* v. *Board of Police Comm.*, 78 Cal. App. 2d 638, 178 Pac. 2d 537 (1947); *Conne* v. *Geary*, 298 Ill. App. 199, 18 N. E. 2d 719 (1939). See also the cases cited in *Butler* v. *Monaghan*,

200 Misc. 327 (Sup. Ct., N. Y. Co., 1951), and annotation, 31 A. L. R. 2d 1142.

Various considerations differentiate the police from other City employees with respect to their relationship to their employer, the people of New York City. As to a potential conflict of interest in connection with labor disputes if policemen were represented by labor organizations, see *Butler* v. *Monaghan, supra.* The New York City Charter, § 439 (Williams Press, 1957), prohibits policemen from contributing to political funds or belonging to any club or association "intended to affect legislation for or on behalf of the department or any member thereof".

In *People ex rel. Masterson* v. *French*, 110 N. Y. 494 (1888), the Court said (pp. 499-500):

> "The government of a police force assimilates to that required in the control of a military body, and the interference of an extraneous power in its practical control and direction, must always be mischievous and destructive of the discipline and habits of obedience, which should govern its subordinate members. If its determinations upon all questions are subject to review, and appeals to some tribunal outside the force may be taken without restraint, it must necessarily lead to a want of respect towards their official superiors, and an impairment of the habits of obedience and discipline which are so essential to the efficiency and good conduct of a well regulated police force."

Matter of Going v. *Kennedy*, 5 AD 2d 173, 182 (1st Dept., 1958), aff'd 5 N Y 2d 900 (1959), recognized "that the police department is a quasi-military organization." See also *Coane* v. *Geary*, 298 Ill. App. 199, 18 N. E. (2d) 719 (1939).

The powers and duties of the police, the extraordinary need for discipline and obedience in their functioning, the necessity for impartiality and avoidance of even the appearance of divided loyalty or conflict of interest, justify treating them as a class apart. At least, the respondents might reasonably so decide.

The grievance procedures seem to contemplate appeal in certain instances beyond the respondent Commissioner of Labor to the Mayor [R. 61-62 (fols. 183-4)]. Exclusion of police from a procedure which may allow appeal beyond the Police Commissioner to the Commissioner of Labor or one of his deputies and then to the Mayor cannot, in view of the considerations we have recited, be deemed unreasonable, arbitrary, or a violation of equal protection guarantees.

It is artificial and unrealistic to contend that those matters which distinguish the police from other employees apply to self-organization (unionization) and collective bargaining arrangements but not to grievances. The Order presents a unified labor relations program, in which grievance machinery is a step in collective bargaining. For example, under departmental rule (see *Butler* v. *Monaghan*, *supra*), the police may not join labor unions, and since the grievance machinery contemplates that such organizations may and probably will represent an employee in the presentation of a grievance (R. 20, 59-61), it is not arbitrary to refrain from applying that machinery to them.

The petitioners have employed inverted reasoning in stating that respondents' objective in excluding policemen from the grievance procedure aspects of the Executive Order is the prevention of unionization, which in turn is

based on the need to maintain strict discipline (Pet. Br., p. 11). Rather, the need to maintain discipline, in the respondents' judgment and in the view taken by the Appellate Division [R. 125-6 (fols. 375-6)], is justification for excluding the police from union organization, from collective bargaining, and from grievance procedures which would involve disputing the orders and rulings of superiors. Each of these "rights" may fairly be considered inimical to the maintenance of discipline, and they are inseparably intertwined.

In essence, equal protection requires that all persons similarly situated be treated alike. The police are not situated similarly to other employees, but the Executive Order does affect all policemen in the same manner.

In any event, a tentative exclusion, subject to future change, from a program of an experimental character [R. 49-50 (fols. 147-9), 65 (fol. 194), 67] cannot be deemed the withholding of a right of such a nature as to merit constitutional protection.

(4)

The New York courts make appropriate distinctions between groups of public employees when it is reasonable to do so. A rule forbidding outside employment which is invalid as to a Department of Welfare investigator may be valid as to a fireman. *Matter of Natilson* v. *Hodson*, 264 App. Div. 384 (1st Dept., 1942), aff'd 289 N. Y. 842 (1943); *cf. Matter of Calfapietra* v. *Walsh*, 183 Misc. 6 (Sup. Ct., N. Y. Co., 1944), aff'd 269 App. Div. 734 (1st Dept., 1945), aff'd 294 N. Y. 867 (1945).

We agree that with respect to other kinds of employees policemen and firemen may stand apart for disciplinary

purposes, which is all that is stated in the two cases cited by petitioners. It does not follow, however, that as between themselves they must be treated as a single class, or that no valid distinctions may be drawn between them. Requirements of strict discipline may be even more compelling for policemen than for firemen. At least, responsible authorities are not arbitrary in believing so. The nature of their respective duties supports that view.

Under the New York City Charter, § 435, the police force is required to:

> "preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; protect the rights of persons and property, guard the public health, preserve order at elections and all public meetings and assemblages; subject to the provisions of law and the rules and regulations of the commissioner of traffic, regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; remove all nuisances in the public streets, parks and places; arrest all street mendicants and beggars; provid proper police attendance at fires; inspect and observe all places of public amusement, all places of business having excise or other licenses to carry on any business; enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses."

In addition, a vast miscellany of regulation is committed to police jurisdiction, ranging from such matters as the possession of firearms to prohibitions against unnecessary noise. See N. Y. C. Adm. Code, Art. 18, Title A.

The City Charter, §§ 487-490, confers upon the Fire Department exclusive jurisdiction to extinguish fires within the City or upon any vessel in the port of New York. The Fire Commissioner has jurisdiction over the location of fire alarm telegraphs and signals, the storage of combustibles, the investigation of causes of fires, the suppression of arson, the inspection of premises for fire hazards, and related powers.

It is discernible that policemen act primarily in relation to persons, whereas firemen act primarily upon property or things. The impact of this difference is not substantially weakened by the circumstance that firemen are given limited powers to make arrests and serve process in criminal actions in "cases arising under laws relating to fires and the extinguishment thereof, and to fire perils" (N. Y. C. Adm. Code, § 487a-15.0), for example, in connection with obstructing fire apparatus (§ 487b-2.0) or false alarms (§ 487e-1.1). Whatever the disciplinary strictness incumbent upon the wielder of a fire hose, we submit that there is reason to subject the possessor of a revolver and a night stick to discipline even more stringent.

Even if the essential distinction between police and firemen is only a matter of degree, that is sufficient under such expressions as those which follow concerning alleged offenses against the right to equal protection of the laws.

The full scheme of the legislature cannot be condemned because the courts may not approve of certain details.

Chamberlin, Inc. v. *Andrews*, 271 N. Y. 1 (1936), aff'd 299 U. S. 515 (1936). The Constitution does not require things which are different "in fact or opinion" to be treated in law as though they were the same. *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Tigner* v. *Texas*, 310 U. S. 141 (1940). Narrow distinctions, if reasonably related to the object of the legislation, will justify legislative classifications. *N. Y. Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 578 (1938). A classification having some reasonable basis does not offend because not made with mathematical nicety or because it results in some inequality. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911). The prohibition of the equal protection clause goes no further than the invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955).

In considering application of the foregoing principles in cases involving public employees particularly, we find, for example, that there is no offense against the equal protection clause in discharging policemen for union membership. *Goodwin* v. *Oklahoma City*, 199 Okl. 26, 182 P. 2d 762 (1947), and cases *supra* page 5. Veterans may be given civil service preference. *Matter of Bateman* v. *Marsh*, 296 N. Y. 849 (1947); *Matter of Potts* v. *Kaplan*, 264 N. Y. 110 (1934). The salaries of teachers may be reduced by a percentage method which results in some inequities. *Phelps* v. *Board of Education*, 300 U. S. 319 (1937). The extension of a retirement system to elective officers of a certain county only is not class legislation. *Goodale* v. *County Com'rs.*, 276 Mass. 114, 178 N. E. 228 (1931). A selection from among three of the highest ranking persons on an eligible list is constitutional. *Ricks* v. *Dept. of State Civil Service*, 200 La. 341, 8 So. 2d 49 (1942).

There is no basis for imputing unconstitutionality to the Executive Order as interpreted by the respondents and the State courts.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHARLES H. TENNEY,
SEYMOUR B. QUEL,
Counsel for Respondents.

SEYMOUR B. QUEL,
EDWARD A. DOBERMAN,
of Counsel.